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No. 80-396

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

The CITY OF NEWPORT, Rhode Island, *et al.*,
Petitioners,

v.

FACT CONCERTS, INC., *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE, AND BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF PETITIONERS, CITY OF NEWPORT, *ET AL.*

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The National Institute of Municipal Law Officers (NIMLO) respectfully moves the Court for leave to file the attached brief as amicus curiae in support of the petitioners. The interest of NIMLO in the subject matter of the case is set out in the brief. Petitioners' letter consenting to the filing of this brief has been lodged with the Clerk of this Court; respondents have withheld their consent.

Under the plain language of Rule 36.2, this brief is timely filed in support of the reply brief of the petitioners at the time that reply brief is due. This motion and brief are being filed within that time.

If, on the other hand, an amicus brief in support of a petitioner is timely only at the time of the petitioner's principal brief, NIMLO

moves for leave to file the enclosed brief out of time (and, correspondingly, moves for leave to make the motion beyond the time set by Rule 29.2).

A principal part of the attached amicus brief is the result to date of a survey by NIMLO of its member municipalities of the impact of claims, in part under the Civil Rights Act, 42 U.S.C. §1983, generally, and, specifically, of claims for punitive damages under that section. This survey is still not completed. However the results received to date from 169 local governments, showing claims of $4 billion for damages generally, and claims against 32 governments for over $1 billion in punitive damages, illustrate the gravity of the issue in this case, and the interference with government operations if the judgment of the Court of Appeals is affirmed.

We feel that this material, which is a matter of public record, but which is not otherwise available to the Court in its collected form, will be of assistance to the Court, in light of the part played in recent cases such as *Owen v. City of Independence,* 445 U.S. 622 (1980), by speculation on the answers to the questions answered in part by this survey.

WHEREFORE, if leave to file out of time is required, the National Institute of Municipal Law Officers respectfully moves for leave to move out of time, and moves for leave to file the attached brief as amicus curiae.

Respectfully submitted,

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TABLE OF CONTENTS

Page

Interest of the amicus curiae 1

Statement of the case 2

Summary of argument 4

Argument 4

I. The availability of punitive damages against governments was not contemplated by the Congress in 1871, and these damages today do not further the purposes of the Civil Rights Act of 1871 5

A. The award of punitive damages was not contemplated by the 42d Congress; the common law in 1871 foreclosed an award of punitive damages against governments 5

B. The availability of punitive damages does not further the remedial goals of the 42d Congress 9

C. More recently, Congress has analyzed the state of the law under §1983 without suggesting either the existence or the desirability of punitive damages against governments 11

II. The experience of local governments with §1983 claims suggests that the availability of punitive damages will impair their fiscal survival and paralyze their officials from fair decision-making 13

A. One hundred and sixty-nine local governments have reported civil rights claims for all kinds of damages totalling $4 billion 14

B. Thirty-two governments reported punitive damages claims exceeding $1 billion 21

Conclusion 25

Appendix: Final Judgment and Order, *Webster v. City of Houston,* C.A. No. H-78-2053 (SD Tex.) 1a

TABLE OF AUTHORITIES

Page

Cases:

Carey v. Piphus,
435 U.S. 247 9

Carlson v. Green,
446 U.S. 14..... 7

Coop v. City of South Bend,
No. 80-1029 (CA7 Dec. 12, 1980) 20

Copeland v. Marshall,
No. 77-1351 (CADC Sept. 2, 1980)..... 20

Monell v. Department of Social Services,
436 U.S. 658 ..... 9, 11

Owen v. City of Independence,
445 U.S. 622 ..... *passim*

Pierson v. Ray,
386 U.S. 547 6

Skidmore v. Seattle,
138 Wash. 340, 244 P. 545..... 8

Tetalman v. Holiday Inn,
500 F. Supp. 217 (ND Ga.) 2

Webster v. City of Houston,
C.A. No. H-78-2053 (SD Tex. Nov. 18, 1980),
appeal pending (CA5) 4, 5, 23

Young v. City of Des Moines,
262 N.W.2d 612 (Iowa)..... 7

Statutes:

Civil Rights Act of 1871, 42 U.S.C. §1983..... *passim*

Federal Tort Claims Act, 28 U.S.C. §2674..... 7

Alaska Stat. §09.50.280 (1962)..... 7

Ark. Stat. Ann.(Supp. 1979)
§12-2901..... 8
§12-3401..... 7

Cal. Gov't Code (Deering) §818 (Supp. 1973-1974)..... 7
Colo. Rev. Stat. §24-19-114(4) (1973)..... 7
Del. Code Ann. tit. 10 §4013 (Supp. 1980)..... 8
Fla. Stat. Ann. §768.28(5) (Supp. 1981)..... 7
Ga. Code Ann.
§2-3401 (Supp. 1977) 8
§69-301 *et seq.* (1976)..... 8
Hawaii Rev. Stat. §662-2 (Supp. 1976) 7
Idaho Code §6-918 (1979) 7
Ill. Ann. Stat. ch. 85 §2-102 (Smith-Hurd) (1966)..... 7
Ind. Code Ann. §34-4-16.5-4 (Burns) (Supp. 1980)..... 7
Iowa Code Ann. §25A.4 (Supp. 1979)..... 7
Kan. Stat. Ann. §75-6105(c) (Supp. 1979) 7
Ky. Rev. Stat. §44.070 (Supp. 1979) 8
Me. Rev. Stat. Ann. tit. 14 §8105 (1980) 7
Mass. Ann. Laws ch. 258 §2 (Law. Co-op) (1980) 7
Mich. Stat. Ann. §3.996 (107), (113) (1977) 8
Minn. Stat. §466.04 (1976)..... 7
Miss. Code Ann. §21-15-6 (Supp. 1979)..... 8
Mo. Ann. Stat. §537.610 (Vernon) (Supp. 1981)..... 7
Mont. Rev. Codes Ann. §82-4324 (Supp. 1977)..... 7
Nev. Rev. Stat. §41.035 (1979)..... 7
N.H. Rev. Stat. Ann. §99-D (Supp. 1979)..... 8
N.J. Stat. Ann. §59: 9-2 (West) (Supp. 1980-1981) 8
N.M. Stat. Ann. §41-4-19 (1978) 8
N.C. Gen. Stat. §143-291 (Supp. 1979)..... 8
Okla. Stat. tit. 51 §154 (Supp. 1980) 8
Or. Rev. Stat. §30.270 (2) (Supp. 1979) 8
42 Pa. Cons. Stat. Ann. §5311.101 *et seq.*
(Supp. 1980-1981)..... 8

R.I. Gen. Laws §9-31-2 *et seq.* (1969) 8
S.C. Code §5-7-70 (1976) 8
S.D. Codif. Laws Ann. §21-1-4 (1970) 8
Tex. Civ. Code Ann. tit. 110A Art. 6252-19 §3 (Vernon) (Supp. 1980-1981) 8
Utah Code Ann. §63-30-22 (Supp. 1978) 8
Vt. Stat. Ann. tit. 29 §1403-04 (1970) 8
W.Va. Const. Art. 6 §35 8
Wis. Stat. Ann. §893.80 (West) (Supp. 1980-1981) 8
Wyo. Stat. §1-39-118(d) (Supp. 1980) 8

Miscellaneous:

Civil Rights Improvement Act of 1977: Hearings on S. 35 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. (1978) 11, 12-13
Cong. Globe, 42d Cong., 1st Sess. (1871) 4, 9-10
123 Cong. Rec. (daily ed. Jan. 10, 1977) 11
125 Cong. Rec. (daily ed. Nov. 6, 1979) 11
D. Dobbs, Remedies (1973) 6, 13
Federal Tort Claims Act: Hearings before the Subcomm. on Admin. Law & Governmental Relations of the House Comm. on the Judiciary, 95th Cong., 2d Sess. (1978) ... 7
H.R. 9219, 95th Cong. 7
H.R. 24, 97th Cong. 7
Jaron, The Threat of Personal Liability under the Federal Civil Rights Act: Does It Interfere with the Performance of State and Local Government?, 13 Urban Lawyer 1 (1981) 21
Lawsuits Against Police Skyrocket; Few Plaintiffs Ever Convince Juries However, Impact (1980) 21
Prisoners Suing Counties, County News, Jan. 21, 1980 21
S. 35, 95th Cong. 11
S. 1983, 96th Cong. 11

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INTEREST OF THE AMICUS CURIAE

The National Institute of Municipal Law Officers (NIMLO) respectfully submits this brief, pursuant to Rule 42 of the Rules of this Court. The National Institute of Municipal Law Officers is an organization of some 1600 members in all states and is composed entirely of municipalities which are political subdivisions of states. Each member municipality participates in the work of NIMLO through its chief legal officer and his assistants.

These chief legal officers, and their municipalities, are

concerned about the rule of this case as applied not only in cases such as this essentially commercial dispute between equals, but also in all Civil Rights Act cases.

The survey which forms the principal part of this brief documents the quantity of Civil Rights Act claims filed against local governments. But, the quality of some of these claims makes the availability of punitive damages particularly subject to abuse. In *Tetalman v. Holiday Inn,* 500 F.Supp. 217 (ND Ga. 1980), the court rejected a claim under 42 U.S.C. §1983 that a city's advertising campaign designed to promote tourism was the cause of the death of a tourist murdered in the city. The availability of punitive damages in such a case will make local governments less likely to defend a case to trial in order to establish the lack of causation or other refutation of the claim of liability. This is but one illustration of the special relation of government to the governed which makes punitive damages inappropriate in §1983 cases.

STATEMENT OF THE CASE

The facts relied on by the respondents Fact Concerts as giving rise to the claim of punitive damages are: (1) that the Newport City Council was insufficiently informed on the nature of the music played by the group Blood, Sweat and Tears to intelligently assess whether the group would attract a dangerous type of spectator to a concert at which it appeared;[1] and (2) that the City Council was in error in concluding that violations of a contract between the City and Fact Concerts, determined by the City

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[1]Brief for the Respondents, at 3.

Manager to exist with respect to precautions against the use of chairs as weapons and the availability of an auxiliary generator, were of sufficient gravity to commend enforcement of the contract and cancellation of the concert if it included Blood, Sweat and Tears.[2]

Throughout, threats of litigation against the City were made by Blood, Sweat and Tears[3] and by Fact Concerts.[4] When the contract was finally enforced against it, Fact Concerts obtained an injunction in state court to permit the concert; nonetheless, Fact Concerts sustained a $72,000 loss on its endeavor.[5] After a jury trial, the federal District Court[6] awarded Fact Concerts this amount in compensatory damages, and an amount in punitive damages totalling $150,000.[7]

The City and official petitioners had not objected to the jury instruction on the availability of punitive damages, a circumstance which influenced the resolution of the issue by the Court of Appeals,[8] which concluded that "there arises a distinct possibility municipalities, like all other persons subject to suit under section 1983, may be liable for punitive damages. . . ."[9]

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[2]*Id.*, at 4-5.

[3]*Id.*, at 4.

[4]*Id.*, at 5.

[5]*Id.*, at 5.

[6]Apparently the respondents' reference, Br.6, to an unrelated case is added to their Statement for the purpose of showing prejudice. Yet, the City has made no claim of prejudice in the District Court's denial of the City's motion to upset the jury verdict. In fact, the District Court ordered a remittitur of punitive damages, reducing them from $200,000 to $75,000 against the City. Pet.App. B-12.

[7]The punitive damages were divided $75,000 against the City and $75,000 against its officers. Brief for the Respondents, at 6.

[8]Pet. App. A-15.

[9]*Ibid.*

SUMMARY OF ARGUMENT

1. The 42d Congress did not intend that punitive damages be available in actions under the Civil Rights Act of 1871 against local governments. The only expression in the debates relevant here was the assertion that the purpose of the Act as a whole was remedial, not punitive. Cong. Globe, 42d Cong., 1st Sess., ~~719~~ 792 (1871) (Rep. Butler). Measured against the uniform unavailability of punitive damages against governments under state law in 1871, Congress cannot be said to have clearly expressed an intention to impose this burden on local governments. This construction is faithful to the remedial purposes of the Civil Rights Act, and the decisions of this Court facilitating a compensatory remedy against local governments.

2. To permit the award of punitive damages, in addition to the free availability of compensatory damages against governments denuded of any defense, would impose a substantial burden on local governments. A survey of 169 municipalities by the amicus reveals claims for compensatory damages of $4 billion, and claims for punitive damages of at least $1 billion against 32 of the municipalities, all pending now. A judgment entered against a city and its officers for $2,500 in compensatory damages and $1,400,000 in punitive damages, is merely illustrative of the danger to local governments nationwide if the judgment is affirmed.

ARGUMENT

The petitioners here are quite correct in asserting: (1) that the 42d Congress' limited discussion of the availability of punitive damages in an action under 42 U.S.C. § 1983, taken in light of the state of the law in 1871 — the only discussion being statements that the purpose of the Civil Rights Act as a whole was remedial not punitive — can be read only as foreclosing an award of punitive damages today;[10] and (2) that imputation today to the 42d

[10]Brief for the Petitioners, at 10-14.

Congress of an intent it could not have formed will have a deleterious effect on the ability of local governments and their officers to govern both fearlessly and fairly.[11]

We direct ourselves especially to empirical support of the petitioners' second proposition. It is our submission that these data show the paralyzing effect of § 1983 claims for compensatory damages. Punitive damages, often unrelated in amount to compensatory damages,[12] make the paralysis worse. These problems exist with respect to all § 1983 cases, not merely the commercial dispute among equals presented in this case.

I

THE AVAILABILITY OF PUNITIVE DAMAGES AGAINST GOVERNMENTS WAS NOT CONTEMPLATED BY THE CONGRESS IN 1871, AND THESE DAMAGES TODAY DO NOT FURTHER THE PURPOSES OF THE CIVIL RIGHTS ACT OF 1871

A. The Award of Punitive Damages Was Not Contemplated by the 42d Congress; the Common Law in 1871 Foreclosed an Award of Punitive Damages Against Governments

This case presents the question whether the paucity of discussion by the 42d Congress on the availability of punitive

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[11] *Id.*, at 14-17, 22-25.

[12] E.g., a verdict and judgment awarding $2,500 in compensatory damages and $1,400,000 in punitive damages against the City of Houston, Texas, and its officers is set out as the appendix to this brief, 1a.

damages against governments should be read as permitting or foreclosing the present award of such damages.

This Court has canvassed the legislative materials from the 42d Congress several times, with inconsistent results, the most recent occasions being last Term.

The availability of punitive damages against governments today cannot be said to flow from either this Court's decision in *Owen v. City of Independence,* 445 U.S. 622 (1980), or the materials canvassed there.[13]

The decision in *Owen* does not influence the result here because this case, like *Owen,* is a case of statutory construction. And the point of construction is a different one here. "Liability for compensatory damages established, governing legislation may still withhold any punitive liability."[14]

Unlike the issue in *Owen,* here, with respect to punitive damages against local governments, the evidence of the state of the law in 1871 certainly shows that "a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.' "[15]

The City has collected the cases in its brief.[16] These cases establish the state of the knowledge of the 42d Congress in 1871:

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[13]We have canvassed these materials in connection with the particular issue in this case. Nothing in the legislative history of § 1983 or in the treatises and other secondary materials published contemporaneously with the 42d Congress, cited by the majority and dissenting Justices of this Court in *Owen,* discussed the availability of punitive damages. We refer to the one mention of the non-punitive purpose of § 1983 by the 42d Congress, at page 9, *infra.*

[14]D. Dobbs, Remedies § 3.9, at 217 (1973).

[15]*Owen, supra,* 445 U.S., at 637 (1980), quoting *Pierson v. Ray,* 386 U.S. 547, 555 (1967).

[16]Brief for the Petitioners, at 26.

that punitive damages were not available against local governments.[17]

The state of the law today is the same: in the absence of an express statute, punitive damages may not be awarded against governments. In at least twenty-six states, punitive or exemplary damages are expressly prohibited by statute.[18] In at least eight

[17]Congresses of more recent vintage have expressly foreclosed punitive damages against governments. The Federal Tort Claims Act forbids them against the federal government. 28 U.S.C. §2674. A bill has been introduced in the 97th Congress to apply some of the entity liability found in *Owen* in §1983 actions against local governments to FTCA actions against the federal government. H.R. 24, §3, at page 6. However, and in spite of this Court's statements in *Carlson v. Green*, 446 U.S. 14, 22 (1980), relied on by the Court of Appeals below, Pet. App. A-14, that bill does not change the FTCA's prohibition of punitive damages. H.R. 24, §4 (punitive damages forbidden for "wrongful acts"). The same language was present in H.R. 9219, §3 (95th Cong.), which was criticized for precluding punitive damages. Federal Tort Claims Act: Hearings before the Subcomm. on Admin. Law & Governmental Relations of the House Comm. on the Judiciary, 95th Cong., 2d Sess., 129 (1978).

[18]Statutes apply to state and local governments unless otherwise indicated. Alaska (Alaska Stat. §09.50.280 (1962)) state; Arkansas (Ark. Stat. Ann. §12-3401 (Supp. 1979)) state; California (Cal. Gov't Code (Deering) §818 (Supp. 1973-1974)); Colorado (Colo.Rev.Stat. §24-10-114(4) (1973)); Florida (Fla.Stat.Ann. §768.28(5) (Supp. 1981)); Hawaii (Hawaii Rev. Stat. §662-2 (Supp. 1976)) state; Idaho (Idaho Code §6-918 (1979)); Illinois (Ill.Ann.Stat. ch.85 §2-102 (Smith-Hurd) (1966)) local governments; Indiana (Ind. Code Ann. §34-4-16.5-4 (Burns) (Supp. 1980)); Iowa (Iowa Code Ann. §25A.4 (Supp. 1979)) state, however, punitive damages were allowed against a municipality where statute abrogating immunity of municipalities was silent, *Young v. City of Des Moines*, 262 N.W.2d 612 (Iowa 1978); Kansas (Kan.Stat.Ann. §75-6105(c) (Supp. 1979)); Maine (Me.Rev. Stat.Ann. tit. 14 §8105 (1980)); Massachusetts (Mass.Ann.Laws ch. 258 §2 (Law. Co-op) (1980)); Minnesota (Minn.Stat. §466.04 (1976)) local governments; Missouri (Mo.Ann.Stat. §537.610 (Vernon) (Supp. 1981)); Montana (Mont.Rev. CodesAnn. §82-4324 (Supp. 1977)); Nevada (Nev.Rev.Stat. §41.035 (1979)); New Jersey

(footnote continued)

states, damages are limited to a specified amount.[19] In at least six states, the common law concepts of sovereign immunity still exist.[20]

(footnote 18 continued)

(N.J.Stat.Ann. §59:9-2 (West) (Supp. 1980-1981)); New Mexico (N.M.Stat.Ann. §41-4-19 (1978)); Oklahoma (Okla.Stat. tit. 51 §154 (Supp. 1980)) local governments; Oregon (Or.Rev.Stat. §30.270 (2) (Supp. 1979)); South Dakota (S.D. Codif. Laws Ann. §21-1-4 (Supp. 1979) in actions in general, no punitive damages allowed unless expressly authorized by statute); Texas (Tex.Civ.Code Ann. tit. 110A Art. 6252-19 §3 (Vernon) (Supp. 1980-1981)); Utah (Utah Code Ann. §63-30-22 (Supp. 1978)); Wisconsin (Wis. Stat. Ann. §893.80 (West) (Supp. 1980-1981)) local governments; Wyoming (Wyo.Stat. §1-39-118(d) (Supp. 1980)).

[19]Delaware (Del. Code Ann. tit. 10 §4013 (Supp. 1980)); Kentucky (Ky.Rev.Stat. §44.070 (Supp. 1979)); Mississippi (Miss. Code Ann. §21-15-6 (Supp. 1979), purchase of insurance constitutes waiver of immunity for governmental functions to extent of policy limits); North Carolina (N.C. Gen.Stat. §143-291 (Supp. 1979)); Pennsylvania (42 Pa.Cons.Stat.Ann. §5311.101 *et seq.* (Supp. 1980-1981), types of damages recoverable enumerated not including punitive or exemplary damages); Rhode Island (R.I.Gen.Laws §9-31-2 et seq. (1969), limits do not apply where engaged in proprietary function and legislature may, by special act, authorize recovery against local governments in excess of statutory limits); South Carolina (S.C.Code §5-7-70 (1976)); Vermont (Vt.Stat.Ann. tit. 29 §1403-04 (1970) purchase of insurance waives immunity to extent of policy limits, and judgment may not be rendered in excess of policy limits); Washington (*Skidmore v. Seattle,* 138 Wash. 340, 244 P. 545 (1926), punitive damages not available unless expressly authorized by statute).

[20]Arkansas (Art. Stat. Ann. §12-2901 Supp. 1979), local governments are immune from liability for damages); Georgia (Ga. Code Ann. §2-3401, Ga. Const. of 1976, Art. 6 §5, ¶I (Supp. 1977)) state, (§69-301 *et seq.* (1976)) municipal corporations; Maryland (judicial decisions); Michigan (Mich. Stat. Ann. §3.996 (107), (113) (1977)); New Hampshire (N.H.Rev.Stat.Ann. §99-D (Supp. 1979)); South Carolina (judicial decisions); West Virginia (W. Va. Const. Art. 6 §35).

B. The Availability of Punitive Damages Does Not Further the Remedial Goals of the 42d Congress

While this appropriately ends the matter of statutory construction,[21] it is also abundantly clear that punitive damages do not further the policies seen by the Court in *Owen* as appropriately achieved by an award of compensatory damages.

Certainly, punitive damages, unlike the award contemplated in *Owen*, cannot further the policy that "[t]he innocent individual who is harmed by an abuse of governmental authority [be] assured that he will be compensated for his injury." *Owen, supra*, 445 U.S., at 657. In this case, Fact Concerts was compensated for its $72,000 lost profits; the award of punitive damages was in addition to these compensatory damages, and exceeded them in amount, even after a remittitur of $125,000.

Compensatory damages of the magnitude prayed against the governments responding to NIMLO's survey, discussed *infra*, are quite sufficient to alert government officials to "weigh the risk that a violation might result in an award of damages from the public treasury." *Owen, supra*, 445 U.S., at 656. Punitive damages are not needed for this purpose of deterrence.[22]

The Congress in 1871 was concerned only with deterrence, not punishment. In discussing the Sherman amendment,[23] Representative Butler of Massachusetts said:

"We propose remedy, not punishment.

* * *

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[21]The respondents candidly admit that the text and legislative history of § 1983 do not support the judgment below. Br. 16 ("the effectuation of the underlying goals of section 1983 takes precedence over a mechanical invocation of common law tort rules.")

[22]Cf. Brief for the Respondents, at 9 (deterrence the objects of § 1983, and this Court's decision in *Owen*).

[23]The Court considered the Sherman amendment and the relevance of its rejection in *Monell v. Department of Social Services*, 436 U.S. 658, 666 (1978). Nothing in that analysis affects this case.

"Now, we do not look upon it as a punishment at all. It is a mutual insurance. We are there a community, and if there is any wrong done by our community, or by the inhabitants of our community, we will indemnify the injured party for that wrong, to the value, in our case, of three-fourths of the damages. We will not say to the man who has suffered the loss, 'You shall bear our losses alone;' but we will stand up manfully, put our hands in our pockets, and pay our share of the loss, in order to make good his damage; we will bear equally with him the burden and the wrong.

"The difficulty in the argument — altogether on the other side — has been that this has been treated as if it were a punitive section only. It insures the citizen the protection of the laws; and the considerations as to the want of power to punish or the want of power to interfere with crimes in the States nowhere applies to this section. It is not punitive or penal, but remedial simply."[24]

While this section of the debates considered an amendment which was not enacted as part of the Civil Rights Act of 1871, it certainly indicates that Congress intended to impose on local governments nothing beyond compensation and the deterrence which comes with the requirement to compensate. The Congress certainly did not intend to punish local governments,[25] whose "members" are the same citizens to be protected by deterring official misconduct.

On the other hand, the prospect of additional punitive damages

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[24]Congressional Globe, 42nd Cong., 1st Sess., 719 (1871) (Rep. Butler).

[25]Cf. *Carey v. Piphus*, 435 U.S. 247, 257, n.11 (1978) (dictum) (specific purpose of deterring or punishing), relied on by the Court of Appeals below, Pet. App. A-14.

In any event, the punishment is doubled, as it was in this case, by the availability of punitive damages against both the local government and government officials. Since the government can act only through its officers, it is particularly inappropriate that punitive damages be awarded against both. Moreover, before the remittitur, the punitive award against the City was $200,000, 2.6 times the award against the officials. Pet. App. B-12.

substantially exacerbates the fear of the dissenting Justices in *Owen* that "officials must look over their shoulders at strict municipal liability for unknowable constitutional deprivations," 445 U.S., at 669.[26]

C. More Recently, Congress Has Analyzed the State of the Law Under §1983 Without Suggesting Either the Existence or the Desirability of Punitive Damages Against Governments

Congress, in its most recent examination of §1983, said nothing to suggest a view that punitive damages had been in 1871, or were now, available in civil rights actions against local governments. The principal purpose of S. 35 (95th Congress) was to amend §1983 to provide that governments were "persons".[27] In his introductory statement, Senator Mathias thought the availability of compensatory damages from governments to be sufficient guarantee of "the deterrent value of section 1983. . . ."[28]

Advocates of stronger civil rights enforcement addressed themselves to the provisions of S. 35, fearing the effect of the bill's preclusion of a good-faith defense by governments.[29] Although it is too late in the day to seek a good-faith defense from this Court,

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[26]In this regard, it is noteworthy that the cases supporting the respondents' deterrence justification, Br. 9-10, involved the award of compensatory damages.

[27]This result was achieved in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Nonetheless, a bill similar to S.35 was reintroduced in the next Congress, S.1983 (96th Cong.), introduced at 125 Cong. Rec. 15991 (daily ed. Nov. 6, 1979).

[28]123 Cong. Rec. (daily ed. Jan. 10, 1977), reprinted in Civil Rights Improvement Act of 1977: Hearings on S.35 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess., 7 (1978) (hereafter, Hearings on S.35).

[29]This result was achieved in *Owen, supra.*

the fear of these advocates in that regard applies with full force to the stronger *in terrorem* effect of punitive damages:

> "Moreover, we are concerned that the creation of too broad a damage exposure for governments from Section 1983 violations would place unhealthy pressures upon the courts in construing the substantive scope of Section 1983 itself and the rights it secures. We start from the perception that, both historically and as a practical matter for the future, the main utility of Section 1983 is as a foundation for injunctive and declaratory relief, both in criminal and civil litigation. While we believe it most useful to add a damage remedy against the government to the remedies available for many violations of Section 1983, the scope of the damage remedy created should not be so broad as to undermine the principal office of Section 1983 as a vehicle for defining the substantive constitutional rights of citizens.
>
> If a good faith defense is not available to governments in Section 1983 damage actions, theoretically a damage action against the government might be premised upon every holding by a state or federal court that the constitutional rights of a citizen have been violated. Thus, every search and seizure held to be unconstitutional, whether in a state trial court or on certiorari to the Supreme Court, might give rise to a later damage action against the government. Likewise, a court would be often unable to find that Section 1983 had been violated for the purpose of awarding injunctive or declaratory relief without also estopping the government in a later damage suit based upon the same violation. In the case of good faith violations of Section 1983, we do not believe the courts should be given only the extreme choice of denying all relief whatsoever to the plaintiff — by finding that the Constitution and Section 1983 have not been violated at all — or awarding not merely injunctive relief but also opening the door to a substantial damage award. The desire of the courts to avoid a drain upon the public treasury might create

a subtle pressure in the direction of restricting the very definition of constitutional rights in the first place."[30]

II

THE EXPERIENCE OF LOCAL GOVERNMENTS WITH §1983 CLAIMS SUGGESTS THAT THE AVAILABILITY OF PUNITIVE DAMAGES WILL IMPAIR THEIR FISCAL SURVIVAL AND PARALYZE THEIR OFFICIALS FROM FAIR DECISIONMAKING

The cases denying punitive damage awards against governments in the absence of express statutory authorization have been questioned for their failure to survey, in support of the denial, "the manner in which liability is imposed on public entities."[31]

NIMLO has surveyed the manner in which — or at least the extent to which — liability is imposed on its member municipal governments.

In connection with an assessment of the overall impact of §1983 litigation, an assessment not limited to the availability of punitive damages and not undertaken for the specific purpose of this case, NIMLO on January 15, 1981 asked the chief legal officer of each of its 1594 member municipalities to report "the total claims now pending . . . under 42 U.S.C. §1981, §1983 and §1985."

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[30]Hearings on S.35, *supra,* at 49 (prepared statement of the Committee on Civil Rights of the Ass'n of the Bar of the City of New York). Assistant Attorney General Days, during whose testimony the Bar Association's statement was introduced, agreed. *Id.*, at 45 ("[I]njunctive relief [is] the most effective way of altering patterns of behavior and requiring close supervision and remedy within an institution, within a governmental entity, for unconstitutional behavior.").

[31]D. Dobbs, Remedies §3.9, at 218 (1973). Dobbs sees the uncertainty as supporting continued denial of punitive damages. *Ibid.*

A. One Hundred and Sixty-Nine Local Governments Have Reported Civil Rights Claims for All Kinds of Damages Totalling $4 Billion

The report of the first member municipalities, organized by state and ranked by amount within the state, shows a total of $4 billion in pending civil rights claims.[32]

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[32]*Municipal Civil Rights Claims Survey*

[The population and general revenues data for cities are, generally, for 1975 (population) and 1976-77 (revenues), and are taken from International City Management Association, The Municipal Year Book 1980, at 9-44. The data for counties are, generally, for 1975 (population) and 1975-76 (revenues), and are taken from International City Management Association, The County Year Book 1978, at 8-40. In a few cases (marked *), population data are taken from the Bureau of the Census, Census of Population - Number of Inhabitants (1970). Blanks indicate unavailable data.]

City	Dollar Amount of Civil Rights Claims Now Pending	Population	General Revenues
Arizona			
Phoenix	$ 160,000,000	665,000	$ 228,508,000
Tempe	2,550,000	84,000	23,113,000
Tucson	1,865,000	296,000	100,979,000
Arkansas			
DeQueen	2,599,150	3,863*	
California			
Los Angeles	200,000,000	2,727,000	1,158,197,000
Los Angeles County	59,228,000	6,987,000	2,861,180,000
El Segundo	7,110,000	15,000	10,226,000
Marin County	5,000,000	220,000	66,071,000
Roseville	4,260,000	20,000	6,710,000
Vallejo	3,242,600	71,000	17,011,000
San Bernardino	2,260,000	102,000	37,375,000
El Monte	1,600,000	68,000	12,430,000
San Diego	1,500,000	774,000	235,259,000
Duarte	1,200,000	15,000	2,721,000
San Leandro	1,002,732	67,000	18,981,000
Burbank	953,492	86,000	32,143,000

(footnote continued)

(footnote 32 continued)

City	Dollar Amount of Civil Rights Claims Now Pending	Population	General Revenues
Colorado			
Aurora	$ 25,302,000		$
Colorado Springs	10,000,000	180,000	58,217,000
Denver	18,440,000	485,000	358,746,000
Northglenn	450,000	35,000	4,458,000
Golden	110,000	13,000	1,458,000
Delaware			
Wilmington	500,000	76,000	81,757,000
Smyrna	500,000	4,243*	
District of Columbia	45,000,000	712,000	1,557,222,000
Florida			
Clearwater	5,150,000	67,000	29,193,000
Volusia County	3,865,000	207,000	22,936,000
Jacksonville	2,546,000	535,000	220,264,000
Miami Beach	2,500,000	94,000	44,613,000
Hallandale	1,500,000	33,000	9,599,000
Opa-Locka	300,000	14,000	3,077,000
Plantation	100,000	33,000	6,019,000
Pensacola	10,000	64,000	22,353,000
Deland	10,000	13,000	3,471,000
Venice	5,000	11,000	3,397,000
Georgia			
Albany	5,000,000	73,000	13,276,000
Douglasville	900,000	12,000	1,843,000
Augusta	155,000	54,000	17,871,000
Illinois			
Chicago	775,093,703	3,099,000	1,228,706,000
Joliet	33,822,000	74,000	19,194,000
St. Charles	555,000	16,000	4,077,000
Willowbrook	290,000	1,169*	
North Aurora	150,000		
Waukegan	105,000	65,000	16,969,000
Carbondale	60,000	23,000	8,669,000
Hoffman Estates	50,000	32,000	4,671,000
Oak Park	40,000	60,000	16,895,000
Peoria	1,008,000	126,000	31,367,000

(footnote continued)

(footnote 32 continued)

City	Dollar Amount of Civil Rights Claims Now Pending	Population	General Revenues
Iowa			
Algona	$ 2,000,000	6,032*	$
Council Bluffs	1,601,200	59,000	19,561,000
Cedar Rapids	1,697,251	109,000	46,274,000
Ames	1,550,000	43,000	16,818,000
Sioux City	270,000	86,000	32,526,000
Waterloo	200,000	78,000	24,977,000
Kansas			
Wichita	9,939,000	265,000	84,717,000
Emporia	1,860,000	22,000	5,699,000
Hutchinson	1,450,000	41,000	9,213,000
Merriam	600,000	11,000	1,605,000
Kentucky			
Berea	141,000	6,956*	
Owensboro	80,000	51,000	26,207,000
Winchester	10,000	16,000	6,162,000
Maine			
South Portland	140,000	23,000	11,523,000
Waterville	10,000	17,000	7,106,000
Maryland			
Anne Arundel County	116,000,000	344,000	233,548,000
Prince George's County	100,000,000	678,000	469,427,000
Baltimore	70,000,000	852,000	1,082,204,000
Hagerstown	3,272,000	37,000	7,858,000
Annapolis	10,000	32,000	8,734,000
Massachusetts			
Methuen	2,000,000	35,000	19,718,000
Michigan			
Flint	15,600,000	174,000	141,484,000
Saginaw	2,000,000	86,000	36,070,000
Kalamazoo	1,500,000	80,000	24,888,000
Plymouth	250,000	12,000	2,982,000
Muskegon County	250,000	157,000	31,972,000

(footnote continued)

(footnote 32 continued)

City	Dollar Amount of Civil Rights Claims Now Pending	Population	General Revenues
Minnesota			
Duluth	$ 1,800,000	94,000	$ 46,677,000
Rochester	171,000	56,000	15,189,000
Mississippi			
Jackson	600,000	167,000	65,440,000
Missouri			
Columbia	201,000,000	63,000	16,248,000
Independence	40,000,000	111,000	28,133,000
St. Louis	40,000,000	525,000	294,518,000
Kansas City	12,500,000	473,000	254,463,000
Berkeley	7,040,000	15,000	3,252,000
Springfield	2,501,000	132,000	48,468,000
Jennings	480,000	18,000	3,583,000
Hazelwood	300,000	14,000	2,799,000
Nebraska			
Central City	1,500,000	2,803*	
Lincoln	600,000	163,000	58,785,000
Omaha	507,500	371,000	117,720,000
Nevada			
Sparks	15,000,000	32,000	10,009,000
Las Vegas	1,250,000	146,000	41,604,000
New Jersey			
Newark	14,050,000	340,000	368,931,000
New Mexico			
Grants	2,000,000	8,768*	
Farmington	1,000,000	28,000	16,522,000
New York			
New York City	251,259,465	7,482,000	14,329,999,000
Scarsdale	1,780,000	19,000	7,646,000

(footnote continued)

(footnote 32 continued)

City	Dollar Amount of Civil Rights Claims Now Pending	Population	General Revenues
North Carolina			
Greensboro	$ 32,000,000	156,000	$ 32,435,000
Wilson	7,560,323	34,000	9,616,000
New Bern	2,270,261	17,000	2,902,000
Goldsboro	1,800,000	26,000	7,261,000
Pembroke	1,560,000	1,982*	
Reidsville	1,100,000	13,000	3,068,000
Fayetteville	300,000	66,000	13,963,000
Gastonia	155,000	49,000	8,875,000
North Dakota			
Minot	80,000	33,000	11, 126,000
Ohio			
Cleveland	672,922,500	639,000	986,940,000
Warrensville Heights	600,800,000	18,000	3,068,000
Dayton	29,890,000	206,000	91,268,000
Solon	22,000,000	13,000	6,091,000
Canton	13,125,000	102,000	30,298,000
Newark	600,000	39,000	7,250,000
Steubenville	350,000	28,000	9,287,000
Kettering	350,000	70,000	10,222,000
Fairborn	100,000	33,000	4,841,000
Cuyahoga Falls	50,000	47,000	10,192,000
Middletown	25,000	48,000	30,742,000
Oklahoma			
Edmond	2,179,520	23,000	5,375,000
Del City	1,907,889	30,000	2,909,000
Enid	201,500	48,000	8,065,000
Geary	115,000	1,380*	
Oregon			
Portland	61,505,997	357,000	140,339,000
Lake Oswego	750,160	19,000	6,117,000
Gresham	224,636	23,000	5,425,000
Pennsylvania			
Philadelphia	100,000,000	1,816,000	1,212,708,000
Pittsburgh	180,000	459,000	151,088,000
Rostraver Township	10,000		

(footnote continued)

(footnote 32 continued)

City	Dollar Amount of Civil Rights Claims Now Pending	Population	General Revenues
Rhode Island			
Newport	$ 5,000,000	29,000	$ 25,405,000
South Carolina			
Spartanburg	100,000	47,000	11,239,000
Tennessee			
Jackson	5,000,000	43,000	38,121,000
Franklin	475,000	12,000	2,451,000
Knoxville	360,000	183,000	93,206,000
Nashville & Davidson County	250,000	423,000	289,873,000
Waverly	200,000	3,794*	
Texas			
Houston	60,000,000	1,327,000	410,987,000
Dallas	59,000,000	813,000	274,618,000
Amarillo	10,100,002	139,000	52,976,000
San Antonio	7,000,000	773,000	161,251,000
Pasadena	6,650,000	95,000	15,669,000
Plano	7,500,000	37,000	8,579,000
Grand Prairie	5,880,000	57,000	23,202,000
El Paso	5,757,000	386,000	77,681,000
Waco	1,625,000	98,000	27,549,000
Arlington	455,000	111,000	22,464,000
Hurst	225,000	28,000	5,001,000
Utah			
Salt Lake City	8,960,398	170,000	48,359,000
Logan	451,000	24,000	3,386,000
Vermont			
Montpelier	140,000	8,609*	
Virginia			
Roanoke	9,961,750	101,000	82,766,000
Arlington County	2,000,000	156,000	125,983,000
Norfolk	1,440,055	287,000	217,811,000
Portsmouth	1,310,000	109,000	78,604,000
Carroll County	200,000	24,000	7,852,000
Loudoun County	20,000	49,000	24,149,000

(footnote continued)

The total of $4 billion in civil rights claims against 169 jurisdictions, as many of them pointed out in their responses, is not the upper limit of the claims. A combination of the plaintiffs' power to amend their complaints and to plead "for such other relief as the Court deems just" has caused municipal officials to consider the actual exposure of their governments to be substantially higher than the reported figures. The reported figures, of course, do not reflect the cost of municipal defense, or the cost of court-ordered attorneys' fees to prevailing plaintiffs.[33]

(footnote 32 continued)

City	Dollar Amount of Civil Rights Claims Now Pending	Population	General Revenues
Washington			
Vancouver	$ 100,000	48,000	$ 14,678,000
Tacoma	45,000	151,000	64,637,000
West Virginia			
Logan	600,000	3,311*	
Buckhannon	250,000	7,261*	
Wisconsin			
Brown County	35,530,000	169,000	33,339,000
Green Bay	715,000	91,000	65,673,000
Brookfield	180,000	33,000	8,815,000
Whitefish Bay	25,000	17,000	3,019,000
Wisconsin Dells	20,000	2,401*	
Wyoming			
Casper	3,800,150	41,000	14,011,000
Jackson	2,800,000	2,101*	
Powell	500,000	4,807*	
	$4,116,311,276	Total Current Civil Rights Claims Against 169 Municipalities	

[33]These fees are not limited by the amounts claimed, or recovered, on the merits of the civil rights claims. E.g., *Copeland v. Marshall,* No. 77-1351 (CADC Sept. 2, 1980) (en banc) ($33,000 recovery, $160,000 attorneys' fees); *Coop v. City of South Bend,* No. 80-1029 (CA7 Dec. 12, 1980) ($510 recovery, $6000 attorneys' fees).

These data are consistent with the few other studies of post-*Monell* claims against local governments.[34]

B. Thirty-two Governments Reported Punitive Damages Claims Exceeding $1 Billion

Although a specification of punitive damages claimed was not requested, 32 of the municipalities responding to the NIMLO questionnaire did set out their punitive damages figures, as follows:

City	Punitive Damages Claimed
Arizona	
Tempe	$ 1,400,000
California	
El Segundo	1,100,000
Vallejo	1,000,000
Stockton	600,000
Orange Cove	150,000
Delaware	
Smyrna	250,000
Illinois	
Joliet	30,115,000
North Aurora	100,000
Carbondale	55,000
Iowa	
Waterloo	100,000

(table continued)

[34]E.g., Prisoners Suing Counties, County News, Jan. 21, 1980, at 12 (Nat'l Ass'n of Counties, Washington, D.C.), summarized in Jaron, The Threat of Personal Liability under the Federal Civil Rights Act; Does It Interfere with the Performance of State and Local Government?, 13 Urban Laywer 1, 24 (1981); Lawsuits Against Police Skyrocket; Few Plaintiffs Ever Convince Juries However, Impact, 1980, at 2 (Americans for Effective Law Enforcement, South San Francisco, California) (increase in filings from 1723 in 1967 to 10,633 in 1976, the latter figure being 1 case per 51 full-time police officers).

(table of punitive damages continued)

City	Punitive Damages Claimed
Kansas	
Hutchinson	$ 1,450,000
Emporia	1,000,000
Maryland	
Hagerstown	770,000
Michigan	
Saginaw	500,000
Missouri	
Columbia	100,500,000
Jennings	320,000
New York	
New York City	346,000,000
North Carolina	
Goldsboro	1,000,000
Ohio	
Cleveland	436,355,000
Warrensville Heights	100,000,000
Cuyahoga Falls	420,000
Steubenville	100,000
Oklahoma	
Edmond	1,125,700
Oregon	
Lake Oswego	1,600,000
Tennessee	
Franklin	5,295,000
Waverly	50,000
Texas	
Plano	1,000,000
Houston	200,000

(table continued)

(table of punitive damages continued)

City	Punitive Damages Claimed	
Utah		
Logan	$ 150,000	
Virginia		
Portsmouth	525,000	
West Virginia		
Logan	300,000	
Wisconsin		
Brookfield	150,000	
	$1,033,681,200	Total Punitive Damages Currently Claimed Against 32 Municipalities

One particular example, set out as the appendix to this brief, at 1a, illustrates that nothing in the reasoning of the opinions of the members of this Court in *Owen* contemplated the case of punitive damages. In a verdict and judgment against the City of Houston, Texas, and its officials, *Webster v. City of Houston,* C.A. No. H-78-2053 (SD Tex. Nov. 18, 1980), appeal pending (CA5), the District Court approved the award of $2500 in compensatory damages and the award of $200,000 in punitive damages against the City and a total of $1,200,000 punitive damages against city officials.

The amount of these claims shows two things.

First, punitive damages are not needed to spur municipal vigilance, nor is the availability of them necessary to encourage individual plaintiffs to expand the horizon of "those constitutional deprivations that have not previously been clearly defined."[35] Four billion dollars in claims, mostly for compensatory damages, seems quite sufficient to aid the flow of adrenalin of both plaintiffs and defendants in §1983 actions.

Second, the harm to municipal operations, the fear of which animated the dissenting Justices in *Owen* to decry the availability of compensatory damages against defenseless municipalities, and which animated state courts and the Congress to forbid punitive damages against governments, has become based in reality.

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[35] *Owen, supra,* 445 U.S., at 651, n. 33.

CONCLUSION

This case is governed by no other decision of this Court. At the same time, speculation in dissent in *Owen* has proved to be an accurate appraisal of the effect punitive damages claims will have on municipal operations.

Nothing in the text, legislative history, or policy of full preservation of civil rights, of the Civil Rights Act of 1871 requires such a result.

The judgment should be reversed and the case remanded.

Respectfully submitted,

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March, 1981

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN RUSSELL WEBSTER, et al.	)	
	)	
vs.	)	CIVIL ACTION
	)	NO. H-78-2053
	)	
THE CITY OF HOUSTON, et al.	)	

FINAL JUDGMENT

This action came on for trial before the Court and a jury on the 7th day of October 1980, and the Court having granted the motions for directed verdict of Defendants P. D. Dillon and J. A. Estes at the conclusion of Plaintiff's evidence, and further having granted Defendant W. E. Byrd's motion for directed verdict at the conclusion of the Defendants' evidence, and the jury having returned the following verdict:

1) that Defendant N. W. Holloway was not liable for violating Randall Allen Webster's constitutional rights;
2) that Defendants D. H. Mays, J. T. Olin, and the City of Houston were liable for violating Randall Allen Webster's constitutional rights;
3) that Plaintiffs John Russell Webster and Billie Ruth Webster sustained $2,548.73 in actual damages;
4) that D. H. Mays be assessed $1,000,000.00 in punitive damages;
5) that J. T. Olin be assessed $200,000.00 in punitive damages;
6) that the City of Houston be assessed $200,000.00 in punitive damages;

and the Court having accepted, received and filed the jury's verdict, it is accordingly

ORDERED, ADJUDGED and DECREED that the Plaintiffs John Russell Webster and Billie Ruth Webster, have and recover from Defendants D. H. Mays, J. T. Olin, and the City of Houston, jointly and severally, the sum of Two Thousand Five Hundred Forty-eight Dollars and Seventy-three Cents ($2,548.73), and it is further

ORDERED, ADJUDGED and DECREED that the Plaintiffs John Russell Webster and Billie Ruth Webster, have and recover from Defendant D. H. Mays the sum of One Million Dollars ($1,000,000.00), and it is further

ORDERED, ADJUDGED and DECREED that the Plaintiffs John Russell Webster and Billie Ruth Webster, have and recover from Defendant J. T. Olin the sum of Two Hundred Thousand Dollars ($200,000.00), and it is further

ORDERED, ADJUDGED and DECREED that the Plaintiffs John Russell Webster and Billie Ruth Webster have and recover from Defendant the City of Houston, the sum of Two Hundred Thousand Dollars ($200,000.00), and it is further

ORDERED, ADJUDGED and DECREED that costs of this action, including a reasonable attorney's fee to be determined by the Court, be taxed against Defendants D. H. Mays, J. T. Olin, and the City of Houston, and it is further

ORDERED, ADJUDGED and DECREED that Plaintiffs take nothing by this action against Defendants P. D. Dillon, N. W. Holloway, J. A. Estes, and W. E. Byrd.

THIS IS A FINAL JUDGMENT.

SIGNED and ENTERED this 18th day of November 1980.

/s/ George E. Cire

GEORGE E. CIRE
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN RUSSELL WEBSTER, et al.	)	
	)	
vs.	)	CIVIL ACTION
	)	NO. H-78-2053
	)	
THE CITY OF HOUSTON, et al.	)	

ORDER

The Court has considered the motions of Defendants Olin and the City of Houston for remittitur and finds that the relief requested herein should be denied. It is therefore

ORDERED that Defendant Olin's Motion for Remittitur be DENIED, and it is further

ORDERED that Defendant City of Houston's Alternative Motion for Remittitur be DENIED.

SIGNED and ENTERED this 18th day of November 1980.

/s/ George E. Cire

GEORGE E. CIRE
UNITED STATES DISTRICT
JUDGE